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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

v.

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF THE DEAF, GALLAUDET COLLEGE, THE NEW YORK SOCIETY FOR THE DEAF, THE NATIONAL EDUCATION ASSOCIATION, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, AND THE DISABLED IN ACTION OF PENNSYLVANIA, INC.

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QUESTIONS ADDRESSED BY THE AMICI

1. Whether the Education for All Handicapped Children Act provides a right to a free appropriate public education, enforceable individually in administrative and judicial proceedings.

2. Whether the Petitioners' alleged conformity with a state plan is a defense to a claim under 20 U.S.C. 1415 that a child's Individualized Education Program (IEP) should include a particular service.

3. Whether the Court of Appeals applied correct standards in holding that the evidence regarding Amy Rowley's unique educational needs supported the District Court's determination that a sign language interpreter is necessary to provide her with an appropriate education.

4. Whether the Writ of Certiorari should be dismissed as improvidently granted.

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *amici* file this brief in support of the respondent, Amy Rowley.

The National Association of the Deaf is a national non-profit organization with approximately 18,000 members who are hearing-impaired adults, parents of hearing-

[1] Letters of Consent to the filing of this brief are being lodged with the Clerk of the Court.

impaired children, and professionals in the area of services to deaf individuals. The National Association of the Deaf is the largest consumer organization of hearing-impaired people in the United States.

Gallaudet College is the only liberal arts college for deaf students in the world. Gallaudet College also has pre-college programs. Kendall Demonstration Elementary School for the Deaf was founded in 1965. In 1970, by Act of Congress, it was designated as a demonstration school, with responsibility to develop innovative programs and to serve as a model for the education of deaf children.

In 1969, Gallaudet College was authorized by the United States Congress to establish the Model Secondary School for the Deaf (MSSD). The MSSD program seeks to be a model program for the nation on the secondary school level. Total communication is used at Kendall and MSSD.

The New York Society for the Deaf was founded in 1911 and incorporated by special act of the New York State Legislature to provide a wide range of services to the deaf individuals in the metropolitan New York area.

The National Education Association (NEA), the nation's largest professional organization with a membership of 1.7 million persons, is an independent entity whose purpose is to advance the interests of the profession of teaching and to promote the cause of education. To this end the NEA has long advocated free, appropriate education for all handicapped individuals, including the provision of support services to meet the learning needs of disabled students.

The American Coalition of Citizens with Disabilities was founded in 1974 to secure and enforce the civil and human rights of all people with physical and mental disabilities.

The Foundation for Science and the Handicapped is a non-profit organization of successful professionals in

various fields who offer their skills to help solve problems related to being handicapped. The Foundation is concerned with developing increased educational and employment opportunities for handicapped individuals.

The Developmental Disabilities Advocacy Network (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled persons, including school-aged developmentally disabled children.

The Association for Children and Adults with Learning Disabilities is an international organization of 60,000 parents, professionals and disabled adults whose purposes include improving regular and special education available to children with learning disabilities.

The Disabled In Action of Pennsylvania, Inc. (DIA) is an organization of disabled adults devoted to promoting the full participation of disabled Americans in education and in other aspects of society.

Because the decision of the Court in this case may impact on the judicial and administrative interpretation of the Education for All Handicapped Children Act, 20 U.S.C. 1401 *et seq.*, *amici* are vitally concerned with the outcome of this litigation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits the most salient facts brought out on the record below, and the facts on which the decision below were squarely based: Amy Rowley does not understand approximately 41 per cent of what transpires in her classroom. The Court of Appeals pointed out that:

> The district court found, based on the evidence before it, including Amy's auditory speech discrimination tests, academic records, and observations of her

> in the classrooms, that Amy misses a substantial part of what goes on in her classroom. The court found that, while 59% of what transpires is now accessible to Amy under her present individualized education program, with a sign language interpreter 100% would be accessible to her. * * *
>
> This is not a class action in which the needs of all deaf school children are being determined. The evidence upon which our decision rests is concerned with a particular child, her atypical family, her upbringing and her classroom experience. In short, our decision is limited to the unique facts of this case. . . (Pet. App. A-6 to A-7).

SUMMARY OF ARGUMENT

The Act, its legislative history, contemporaneous regulations, court decisions and the New York state plan itself all expressly say that a free appropriate public education is a *right* which is individually enforceable under § 1415 of the Act. This right of action is not limited to the question whether school authorities' IEP recommendations are "in conformity with the state plan." Petitioners' contentions regarding state plans, certainly New York's plan, misconceive fundamentally the nature and purpose of these plans. Congress intended exactly what it said, that *any and all* matters relating to the provision of a "free appropriate public education"—including refusals to provide particular services—were to be subject to the individual complaint procedure established by § 1415.

There is no debate that a sign language interpreter service can be encompassed within the free appropriate public education requirement of the Act for a particular child. The Court of Appeals concluded that the services of an interpreter were necessary to bring Amy's educational opportunity up to the level of educational opportunity offered to her non-handicapped peers. They found this was a useful standard to determine if the school district was providing an appropriate education

to meet Amy's needs. This standard is completely in accord with the language and legislative history of the Act. Applying these legal criteria, two courts below properly concluded, as a matter of fact, that Amy could be appropriately educated only if she had access to total communication.

The Petitioners have raised issues for the first time in this Court that are not presented properly on the record or with sufficient clarity. The absence of the state plan from the record, for example, and the lack of any examination below of its role and function, is a serious impediment to evaluating Petitioners' assertions regarding the plan. In light of these difficulties, the writ of certiorari should be dismissed as improvidently granted.

ARGUMENT

I. THE ACT CREATES AN INDIVIDUAL ENFORCEABLE STATUTORY RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION FOR EACH HANDICAPPED CHILD IN STATES WHICH ELECT TO RECEIVE FUNDS UNDER THE ACT.

A. The Act Creates a Right to a Free Appropriate Public Education.

This is the first case in which this Court has been called upon to interpret Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 [hereinafter "the Act"].

"The starting point in every case involving construction of a statute is the language itself." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977). The language of this Act expressly establishes a judicially enforceable individual right to a free appropriate public education and to services required to give content to

that right, for all handicapped children in each state that accepts funds under the Act.

The Act states that its purpose is "to *assure* that all handicapped children have available to them," within time periods specified in the Act, "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs * * *." 20 U.S.C. 1401 note (emphasis added).

To accomplish that purpose, the Act requires a state to demonstrate that certain "conditions" must be met in order to qualify for assistance. 20 U.S.C. 1412. Among these "conditions" are the following:

1. "The State has in effect a policy that *assures* all handicapped children *the right* to a *free appropriate public* education." 20 U.S.C. 1412(1) (emphasis added).

2. The State has developed a plan setting forth the State's policies and procedures "to *assure*" that "a free appropriate public education *will be available* to all handicapped children * * * within the State," between certain ages, by specified dates. 20 U.S.C. 1412(2) (emphasis added).

3. The State has established procedures "to assure that, to the maximum extent appropriate," handicapped children receive supplementary aids and services to allow them to be educated with non-handicapped children. 20 U.S.C. 1412(5)(A) and (B); 1415.

These provisions are mandatory. Not only are they "conditions" of funding, but they are also "requirements": the State educational agency is "responsible for *assuring*" that these "*requirements* are carried out." 20 U.S.C. 1412(6) (emphasis added).[2]

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[2] Thus, the provisions in question here bear no resemblance to the provision held to be precatory in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531 (1981).

The legislative history of the Act confirms congressional intention to create a statutory right to a free appropriate public education, enforceable against the states. The Senate Report summarizes the conviction of the Congress on this issue:

> It can no longer be the policy of the Government to merely establish an unenforceable goal . . . . S. 6 takes the positive necessary steps to ensure that the rights of children and their families are protected.

S. Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975). *See also* H. Rep. No. 94-332, 94th Cong., 1st Sess. 15 (1975).

In addition, contemporaneous regulations adopted by the agency charged with enforcement of the statute confirm that a right to a free appropriate public education was created by the Act. *See* 34 C.F.R. 300.300 (each state shall "insure" that a free appropriate public education is available). The agency's accompanying comments call the obligation a "requirement." 42 Fed. Reg. 42488 (Aug. 23, 1977) [3]

All of the Courts of Appeals that have had occasion to deal with the matter have recognized that the Act creates a right to a free appropriate public education, and that § 1415 grants an express private right of action to enforce that right, including determination of the services to be included in a child's IEP. *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); *Tatro* v. *State of Texas*, 625 F.2d 557 (5th Cir. 1980); *Battle* v. *Comm. of Pa.*, 629 F.2d 269 (3d Cir. 1980),

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[3] See also 34 C.F.R. 300.121-122 (annual program plans to show that the state "insures" that a free appropriate public education is a "right"); 34 C.F.R. 300.346 (each IEP to contain a statement of the "specific special education and related services to be provided to the child"); 34 C.F.R. 300.504, 506 (complaint procedures apply to "the provision of a free and appropriate public education to the child.")

cert. denied sub nom. Scanlon v. *Battle*, 80-827 (June 22, 1981).

The existence of a statutory right to a free appropriate public education was never contested by Petitioners until this new issue was raised in their brief before this Court. Indeed, the New York state plan acknowledges that the Act "guarantees certain rights to children with handicapping conditions and their parents," and requires the state to "promise" that a free appropriate public education "will be available" to all handicapped children between 3 and 18 by September 1, 1978. *Helping Children with Handicapping Conditions in New York State: The New York State Plan Submitted Under the Education for All Handicapped Children Act, Final, 1980-81*, p. 33-34. See State Plan, Appendix A. The plan also states that "(a)ll school-age children have an *absolute right* to a free appropriate education." *id.* at 183. (emphasis added). It was written to explain "the requirements of the Federal Education for All Handicapped Children Act . . . ." *id.* at ix. The plan expressly recognizes the rights and obligations that the state would incur on receipt of federal funds under the Act. New York, therefore, had notice of rights created by the Act, and the obligation imposed on it. The Petitioners now suggest, for the first time, that no rights were created. However, their own admissions in their state plan contradicts this contention.

The Act, its legislative history, contemporaneous regulations, court decisions and the New York state plan itself all expressly say that a free appropriate public education is a *right.*

B. The Act Provides an Individual Cause of Action on Any Matter Related to Provision of a Free Appropriate Public Education.

The right to a free appropriate public education is individually enforceable under the Act, 20 U.S.C. 1415. A handicapped child and his/her parents can present

complaints in administrative and judicial forums on "any matter relating to . . . the provision of a free public education to a [handicapped] child." 20 U.S.C. 1415 (b)(1)(E). The Conference Committee intentionally emphasized "*any* matter" to stress the broad scope of the complaint procedure. S. Rep. No. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 48-49 (1975) (emphasis in original). Senator Williams—a chief sponsor, chairman of the Senate committee and floor manager for this legislation—made explicit in the floor debate that the intent of the Conference provisions was to allow review of questions relating to a particular service. He pointed out that in addition to disagreements about evaluation and placement, a parent "may present a complaint alleging that a state or local educational agency has *refused to provide services* to which a child may be entitled * * *" 121 Cong. Rec. 37415 (1975) (emphasis added).[4]

Thus, Congress intended exactly what it said, that *any and all* matters relating to the provision of a "free appropriate public education"—including refusal to provide particular services—are subject to the individual complaint procedure established by § 1415. It clearly was not the intent of Congress to limit proceedings under § 1415 in the manner advocated by the Petitioners.

Judicial enforcement of individual program decisions under the Act does not undermine state and local agencies' authority to develop educational programs. Local education agencies, with the participation of parents, must annually identify, evaluate and plan for the unique educational needs of each handicapped child. 20 U.S.C. 1414(a)(5); 1415(b). When a dispute arises about any matter relating to the child's individual program, Congress established a due process procedure that

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[4] This Court has often noted that the statements of legislative sponsors deserve substantial weight in interpretation of a statute. *Simpson* v. *U.S.*, 435 U.S. 6, 13 (1978); *National Woodwork Mfg. Ass'n.* v. *N.L.R.B.*, 386 U.S. 612, 640, rehearing denied, 387 U.S. 926 (1967).

gives the state the first opportunity to resolve factual disputes, to review contested decisions, and to correct errors involving evaluation, placement and programs. 20 U.S.C. 1415(b)(1), 1415(c). But the statute does not leave the final decision with the state or local agency; rather, aggrieved parties have a statutory right to bring a civil action in state or federal court contesting any matter which could have been raised during the administrative proceeding below. 20 U.S.C. 1415(e)(2). This express private right of action further distinguishes this Act's statutory scheme from the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 *et seq.*, at issue in *Pennhurst*.

Congress realized that judicial review of individual program decisions was necessary because of the past neglect of handicapped children by the states that led to passage of the Act. The House Report pointed out that in spite of increased recognition of the rights and needs of handicapped children, there existed

> . . . an alarmingly high number of handicapped children who do not have an appropriate special education available to them. It is clear that a *federally-mandated grievance-compliance mechanism is essential* if any further meaningful progress is to be made in serving the needs of handicapped children. H. Rep. No. 94-332, 94th Cong., 1st Sess. 14 (1975) (emphasis added).

When a civil action is brought, the court receives the records of the administrative proceedings below. The Act, however, does not require a court to give specific weight to the decisions previously made by the agency. The statute contemplates a *de novo* review role by a district court, including the hearing of additional evidence and reaching an independent decision based on a preponderance of the evidence. 20 U.S.C. 1415(e)(2).[5]

[5] The Conference Committee deliberately "strengthened" § 1415 by requiring independent judicial enforcement of the Act. S. Rep. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 48-49 (1975). In addi-

See also, Kruelle v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); S. Rep. No. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 50 (1975). Finally, the Act grants the courts wide discretion to order "such relief as the court determines is appropriate" 20 U.S.C. 1415 (e) (2).

Congress has created a statutory right, and provided for an explicit statutory remedy through the courts. This Court has repeatedly emphasized that it must defer to such express decisions of the legislature.

> We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 318 (1980).

See also *Environmental Protection Agency* v. *Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980).

II. SUPPORT SERVICES PROVIDED AS PART OF A FREE APPROPRIATE EDUCATION MUST MEET THE UNIQUE NEEDS OF EACH HANDICAPPED CHILD.

A. The Scope of Supportive Services Required to be Provided Under the Act is Not Limited by the Contents of a State Plan.

Petitioners contend that a district court's review under § 1415(e) (2) is limited to determining whether the education program or other services being offered to a handicapped child are in express violation of the state plan.

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tion, Congress rejected a "substantial evidence" standard of judicial review for claims brought under the Act, *id.* at 47-50, and instead authorized the reviewing court to "bas[e] its decision on the preponderance of the evidence." 20 U.S.C. 1415(e) (2).

Such a contention sidesteps the clear and detailed language of § 1415 discussed above; ignores the statutory definition of special education as "specially designed instruction. . . to meet the unique needs of a handicapped child" 20 U.S.C. 1401(16); and misconstrues the content and function of a state plan.

A free appropriate public education includes special education and related services which meet each of the following four conditions:

> (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section [1414(a)(5) of this title.] 20 U.S.C. 1401 (18).

Petitioners contend that a free appropriate public education for every child is whatever the state agency by means of "standards", referred to in subpart (B), says it is. Obviously, such a reading would make the entire remainder of this statute meaningless. As the United States has pointed out:

> Even if the "standards of the State Educational Agency" . . . were set out in the State plan, and even if Amy Rowley's education met those standards, neither of which has been established on the record, the services provided to her would not be appropriate if they failed to satisfy any other provisions of 20 U.S.C. 1401(18). See United States brief in opposition to granting certiorari in this case, p. 13.

Limiting a state's obligations to providing only the services identified in a state plan could, as in this case, foreclose provision of necessary special education and supportive services. Such a result is contrary to the Act's requirement that "special education" be "specially designed . . . to meet the unique needs of a handicapped

child," 20 U.S.C. 1401(16) as well as 20 U.S.C. 1401 (19), 1412 and 1415, and the other provisions of 20 U.S.C. 1401(18).

A state plan provides only a general administrative mechanism for determining eligibility under the Act. The plan, like the Act, does not and cannot prescribe in advance an individual child's program. The Congress specifically left that formulation to the Individualized Education Program (IEP) process. 20 U.S.C. 1401(19). For these reasons, a court cannot look to a state plan to determine whether a certain program or a particular service meets the child's "unique needs" and provides the "appropriate" program mandated by the Act.

Approval of a state plan merely connotes general approval of the procedures and overall planning set out in the plan. Such approval does not sanction the state's refusal to provide a particular service to an individual child, particularly where, as here, the plan does not directly address the issue in dispute.

The New York state plan is silent on the provision of sign language interpreters; however, Petitioners concede that such a service is not prohibited by the plan when a deaf child is found to need total communication.[6] (Pet. Br. at 42.) Notwithstanding silence of a state plan on the provision of a particular service, a state may be required to provide the service if it is necessary to meet the unique needs of an individual child. *See*, e.g., *Battle*

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[6] Total communication is a system of communication with deaf people that involves the flexible use of a wide range of communication methods—speech, amplification, manual sign language systems, touching and visual cues. Its hallmark is its emphasis on communication with a deaf person by simultaneously speaking or mouthing words and signing them. See the findings of the District Judge below. (Pet. App. C-3). Total communication would not always involve the use of a sign language interpreter in an education setting. An interpreter is not necessary when the teacher is skilled in sign language, as is usually the case when deaf children are educated in special classes or special schools.

v. *Comm. of Pa.*, 629 F.2d 269, fn.13 (3d Cir. 1980), *cert. denied sub nom. Scanlon* v. *Battle*, 80-827 (June 22, 1981) (services in excess of 180 days may be required for handicapped child in spite of silence or ambiguity of state plan).

The New York plan does not purport to identify or list any services that may be needed to provide a particular child with an appropriate education. It appears to require little if anything with respect to the identification, *or* evaluation, *or* placement, *or* the provision of a free appropriate public education for any handicapped child. Therefore, if Petitioners are right that the silence of the plan on such matters means that they are matters for unilateral decision by local school authorities and not subject to administrative or judicial review under § 1415, then Petitioners would be hardpressed to explain what issues of substance can be reviewed under § 1415, or what purpose the § 1415 review procedures serve. Congress deliberately rewrote § 1415 to prevent such a misinterpretation.

B. Provision of a Sign Language Interpreter is Within the Statutory Requirements of a Free Appropriate Education.

As was described in the previous section, the central mandate of the Act is that recipient states and their localities must provide their handicapped school-aged residents with free appropriate public education that meets their unique needs. 20 U.S.C. 1412(1); 1414(a)(1)(C)(ii). Given the vast array of handicaps covered by the Act and the almost infinite number of ways in which these handicaps can have an impact on particular children, Congress did not attempt to specify the precise content of an appropriate education for each handicapped child. Instead, Congress set out a detailed procedure for determining a free appropriate public education which permits individual programmatic decision-making.

Subpart (D) of the definition of free appropriate public education incorporates the process for individual decision-making known as the Individualized Education Program (IEP). 20 U.S.C. 1401(18). That process, described at length in § 1401(19), provides for qualified educators, together with the parents of the handicapped youngsters, to meet and develop an annual education program plan which takes account of each youngster's strengths and weaknesses. As noted earlier, any part of the IEP which is disputed can be reviewed by means of the detailed procedures described in § 1415.

The school system and Amy's parents are in agreement that Amy should be placed in regular classes with her age group. The dispute centers around the kind of special supplementary aids and services she needs to participate meaningfully in the education program. In determining what education program will meet the child's unique needs, the state must assure that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped. . . ." Separate education is permissible only when "the nature and severity of the handicap is such that education in regular classes without the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(5)(B). Moreover, each local education agency must assure that "to the maximum extent practicable and consistent with [20 U.S.C. 1412](5)(B)," it will provide "special services *to enable (handicapped) children to participate* in regular school programs." 20 U.S.C. § 1414(a)(1)(C)(iv).

There is no debate that a sign language interpreter service can be encompassed within the free appropriate public education requirement of the Act for a particular child. It has already been noted that, to the extent that it is relevant, the New York state plan does not prohibit interpreters for deaf children. The Court of Appeals below noted that Petitioners "concede that the defi-

nition of 'special education,' Section 1401(16), and 'related services,' Section 1401(17), and regulations promulgated pursuant to the Act are sufficiently broad to encompass a sign language interpreter." (Pet. App. at A-5 fn. 4). In addition, sign language services can be "supplementary aids and services" within § 1412(5)(B). See 123 Cong. Rec. E4307 (daily ed. July 11, 1977) (remarks of Sen. Williams).

Subsequent 1978 legislation and its legislative history specifically cite interpreters as a necessary supportive service required by the Act. In the 1978 Amendments to the Rehabilitation Act of 1973, § 304(d), 29 U.S.C. 744(d), authorizes federal grants "[f]or the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals." The Senate Report explains that § 304(d) was enacted partially "in response to the requirements imposed by . . . Public Law 94-142." S. Rep. No. 95-890, 95th Cong., 2d Sess. 41 (1978). Senator Stafford, the ranking minority member of the Subcommittee on the Handicapped, stated that this section would "seek to guarantee that properly trained interpreters would be available to our school age population of deaf children." 124 Cong. Rec. 30328 (1978).

In another statute, passed within a few days of the 1978 Rehabilitation Amendments, Congress expressly found and declared that "due to the rapid implementation of programs to assist handicapped individuals mandated under the Education for the Handicapped Act . . . there is a need for people to provide the special supportive services . . . *required* by these Acts." 29 U.S.C. 876(a)(1) (emphasis added). To meet this need, Congress directed the Secretary of HEW to establish programs ". . . which provide individuals with the skills necessary to train or provide assistance to handicapped persons, including, but not limited to, interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. 876(b).

In view of the above, it is clear that sign language services are within the scope of services required by the Act.

III. THE COURT BELOW PROPERLY CONCLUDED THAT AN APPROPRIATE EDUCATION PROGRAM FOR AMY ROWLEY MUST PROVIDE HER WITH EQUAL EDUCATIONAL OPPORTUNITY.

In determining which programs and services are required to meet an individual child's "unique needs,"

> . . . it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide. Needs arise in the context of achieving certain goals, and surely there are certain ends, and not others, that are the concern of this legislation. *Armstrong* v. *Kline*, 476 F. Supp. 583, 603 (E.D. Pa. 1979); aff'd in part and remanded in part *sub nom. Battle* v. *Comm. of Pa.*, 629 F.2d 269, 276 (3d Cir. 1980), *cert. denied sub. nom. Scanlon* v. *Battle*, 80-827 (June 22, 1981.)

The Court of Appeals concluded that the services of an interpreter were necessary to bring Amy's educational opportunity up to the level of educational opportunity offered to her non-handicapped peers. They found that this was a useful standard to determine whether the school district was providing an appropriate education to meet Amy's needs. This standard is completely in accord with the language and legislative history of the Act. In its Statement of Findings and Purpose, Congress found that:

> [M]ore than half of the handicapped children in the United States do not receive *appropriate* educational opportunity which would enable them to have *full equality of opportunity*. 20 U.S.C. 1401 note (emphasis added).

The Senate Report accompanying the original bill restates Congress' concern with providing equal educational opportunity:

> This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. . . . It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws *to guarantee that handicapped children are provided equal educational opportunity.* (emphasis added). S.Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975).

The major sponsors constantly reiterated the mandate of equal educational opportunity during floor debate on the 1974 Mathias Amendment and the Act.[7]

It is also clear that Congress intended that educational opportunity to handicapped children be measured in comparison to the opportunity available to non-handicapped children. As Senator Stafford, floor manager on the Act, declared:

> We can all agree that all handicapped children should be receiving an education. We can all agree that that education should be *equivalent, at least,* to the one those children who are not handicapped receive. 121 Cong. Rec. 19483 (1975) (emphasis added).

Perhaps the clearest example in the Act is found in the requirement that:

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[7] See, e.g., 120 Cong. Rec. 15267, 15268, 15273 (1974) (remarks of Sen. Mathias); *id.* at 15273 (Sen. Humphrey); *id.* at 15277 (Sen. Montoya); 121 Cong. Rec. 15832 (remarks of Rep. Quie); *id.* at 19483, 37410 (Sen. Randolph); *id.* at 19504 (Sen. Humphrey); *id.* at 19505 (Sen. Beall); *id.* at 23704 (Rep. Brademas); *id.* at 25540 (Rep. Grassley); *id.* at 37030, 37031 (Rep. Mink); *id.* at 37412 (Sen. Taft); *id.* at 37413, 37414 (Sen. Williams); *id.* at 37417 (Sen. Schweiker); *id.* at 37418, 37419 (Sen. Cranston); *id.* at 37419 (Sen. Beall).

> . . . [T]o the maximum extent appropriate, handicapped children . . . [must be] educated with children who are not handicapped. 20 U.S.C. 1412(5)(B).

The statute speaks of the provision of a "full educational opportunity to all handicapped children." 20 U.S.C. 1412(2)(A)(i). The House Report accompanying the Act emphasizes:

> (a) each child requires an educational plan that is tailored to *achieve his or her maximum potential.* . . . H. Rep. No. 94-332, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

In the Senate Report:

> The Committee points out . . . that a handicapped child has a right to receive all services normally provided a non-handicapped child enrolled in a public elementary or secondary school. Thus, he has a right to . . . all other services which are provided to all children within the school system, and a right to as many options in curricula as are available to all children. S. Rep. No. 94-168, 94th Cong., 1st Sess. 12 (1975).

Both the statute and its legislative history show Congress' intent to insure meaningful educational opportunity to handicapped children.

Petitioners and Judge Mansfield maintain, however, that "self-sufficiency" is the chief goal of the Act, rather than equal educational opportunity. That position is based on a misunderstanding of the Act. As Congress realized and discussed throughout the legislative history of this Act, for some severely mentally impaired youngsters, an equal opportunity to achieve their very limited potential is an opportunity to reach toward self-sufficiency, a programmatic goal which is achieved by non-

handicapped and most handicapped children before reaching school or shortly thereafter.[8]

But this does not mean that an opportunity to achieve self-sufficiency would constitute equal educational opportunity for a child with less restricted educational potential. The District Judge in *Armstrong* noted the limited application of this programmatic goal to the severely mentally impaired youngsters who were the subject of that litigation.

> By enunciating this standard, the Court does not mean to imply that it is the only one that is used to evaluate whether a program is 'appropriate' and meets the 'unique needs' of the handicapped child. Of course, Congress may have had other goals that it wished the educational program to satisfy (including allowing the handicapped child access to programs available to non-handicapped students) which may be considered in determining whether a program meets the unique needs of the handicapped child. *Id.* at 604.

Congress included all handicapped children in the coverage of the Act. A self-sufficiency standard would not be applicable to the majority of these children and would therefore be inconsistent with Congress' intent to meet their unique needs.

Finally, contrary to the assertions of the Petitioners, defining appropriate education in part in relation to equal educational opportunity does not result in extraordinary or optimal programming for handicapped children. Equal educational opportunity does not require the provision of all programs and services which might prove beneficial to handicapped youngsters. Instead, it limits the mandate only to those items which are necessary to provide handicapped children with an educational oppor-

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[8] Most visually handicapped, deaf, hard of hearing, speech handicapped, orthopedically impaired and learning disabled children would be in this category.

tunity commensurate with that available to the non-handicapped children.[9]

Amy's case illustrates the inaccuracy of Petitioners' allegation that application of these legal criteria will result in optimal programming for handicapped children. Total communication will only give Amy an equal opportunity to have exposure to the same material, and to learn the same things, as children of comparable intelligence and initiative.

IV. THE COURTS BELOW MADE PROPER FACTUAL FINDINGS THAT ARE LIMITED TO THIS PARTICULAR CHILD.

A. The Courts Below Made Proper Factual Findings That Amy Rowley Requires Total Communication in Order to Receive an Appropriate Education.

Applying the legal criteria described in Section III, two courts below concluded, as a matter of fact, that Amy could be appropriately educated only if she had access to total communication.

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[9] Petitioners take out of context and make such of the District Court's statement that a determination regarding whether a child is receiving an equal educational opportunity requires "measurements" of "potential" and the "shortfall" between potential and achievement. In fact, the District Court never tried to undertake scientifically these measurements. Rather it focused on simpler and more readily discoverable factors such as how much Amy could be reasonably expected to understand, what physical impediments to equal opportunity were imposed by her handicap and whether the steps which had been taken by the school district were sufficient to overcome these impediments, and general information regarding the educational needs of and resources available to deaf children. The Court of Appeals approach only considers what services are necessary to bring Amy's educational opportunity up to the level of the educational opportunity offered to her non-handicapped peers. This equal opportunity approach does not require measurements and comparisons of "potential" or "shortfall."

This Court has held that "[i]t is not our place . . . to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976). Moreover, this Court has often held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1948); *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635 (1966).

There is no such exceptional show of error here. The District Court found on the basis of auditory speech discrimination tests that by making use of her hearing aids and her lip-reading skills, Amy can identify only 59 per cent of the words which are spoken to her. With the use of total communication, Amy can identify 100 per cent of the words which are spoken to her. The finding that she does not have access to 41 per cent of what is said in the classroom is further supported by evidence that Amy's word discrimination is hampered when there is noise in the classroom; when more than one person speaks at a time; when backs of speakers are turned to her or when films are being shown.

The District Court also found that her scores on the Metropolitan Achievement Test were about average for her class but that her scores on the Stanford Achievement Test, which was administered to her in sign language, were well above average, demonstrating that she performs at a higher academic level when provided with total communication.

The District Court found that this evidence "establishes that she understands considerably less of what goes on in class than she could if she were not deaf." (Pet. App. C-8, C-9). These findings rebut Petitioners' erroneous assertion that "Amy understands all of what is transpiring in her class." (Pet. Brief, 78).

The District Court also found that Amy's parents are both deaf and have raised Amy since birth using total communication. The Court recognized that her parents' efforts, as well as her own, enabled her to remain slightly above the median of her class. (Pet. App. C-14). The Court considered expert testimony that established without contradiction "that there is a marked trend toward the use of total communication in the education of the deaf—a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication." (Pet. App. C-16)

In making factual decisions regarding Amy, the courts properly considered, but were not bound by, "generally accepted methods of special education for the handicapped." (Pet. App. C-15). Nothing in the Act requires school districts or courts to ignore the available general learning concerning the education of students with a particular disability. The Court of Appeals carefully reviewed the record and a majority concluded "that the district court's findings of fact are not clearly erroneous, but are adequately supported by the evidence." (Pet. App. A-5).

B. The Limited Holding of the Court of Appeals that Amy Requires Total Communication to Meet her Unique Needs Does Not Dictate the Same Result for All Other Deaf Children.

Petitioners assert that if the lower court's decision stands, courts could make decisions "on the category of handicapping condition rather than on the unique needs of the individual pupil." (Pet. at 40). The Court of Appeals, however, based its decision on the evidence concerning "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience." (Pet. App. A-7). They clearly limited their decision "to the unique facts of this case . . . ." (Pet. App. A-7).

The Petitioner Commissioner has conceded this point in his interpretation of this case in a recent administrative appellate decision. In the *Matter of the Appeal of the Board of Education of Sachem Central School District*, Commissioner Ambach reversed a hearing officer applying *Rowley* to all deaf children. The Commissioner held: "It is clear from the opinion affirming the District Court decision that the Circuit Court did not consider the lower court decision to be one of general application to all children who have hearing disabilities. Each case concerning the placement of deaf children must of necessity depend upon the needs and abilities of the individual child for whom the placement is sought" (See Appendix B at p. 15a).

Nevertheless, Petitioners distort the fiscal impact of this admittedly limited decision. Very few of the deaf and hard of hearing students in New York are in need of interpreter services.[10] Mildly to moderately hard of hearing students would not be materially aided by such a supplementary aid. Their handicap is not severe enough to require the use of total communication; a properly fitted and maintained hearing aid is sufficient in most such cases to give them full access to classroom discussion. Supplementary language and speech instruction would also be needed for some such students, but not classroom interpreting. Deaf children who have been brought up utilizing an oral approach and who are enrolled in oral programs do not depend upon sign language interpreting. Many of the severely to profoundly deaf children in New York State are in self-contained classes, whether oral or total communication classes. These children, while in such classes, do not require interpreting services. Presumably, their teachers possess the requisite

[10] Petitioners allege that there are 7,000 deaf and hard of hearing students in New York. However, New York's own State Plan indicates that in 1979-1980, there were only 3,449 deaf children and 1,609 hard of hearing children. See State Plan, Appendix A, at 213.

skills and certificates to teach them using the appropriate method. Such children may be mainstreamed for only part of their school day in particular subjects. In such instances, individual decisions about each child's need for interpreter services must be made taking a number of factors into consideration: the type of class, the child's abilities, the sensitivity and awareness of the teacher, the physical environment of the class, and other factors which may be unique to the situation. Brill, MAINSTREAMING THE PRELINGUALLY DEAF CHILD (1978). Similarly, many profoundly deaf children are in day schools and residential schools, and attend classes only with other deaf children.[11]

Finally, as the Court of Appeals pointed out, this case involves an atypical family. Only a small percentage of deaf children have deaf parents who have raised their children since birth using total communication. Thus this case is indeed unique with no general application. It will not have the effect of requiring a sign language interpreter for every deaf child in New York, since not every deaf child is in or will be placed in an educational environment in which interpreters are required.

V. *AMICI* SUGGEST THAT THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Petitioners argue that the lower courts were wrong in failing to dismiss the complaint in this case "upon demonstration by the local school district that it was in conformity with the state plan." (Pet. Br. p. i). That issue is not properly presented in this case, and this Court has no basis to decide the question because Petitioners made no such "demonstration" below; they did not even

[11] The New York State Plan indicates that deaf children are in self-contained classrooms in local schools, in Board of Cooperative Educational Services (BOCES) programs, in one state operated school, in 7 state-supported schools, special act schools and nonpublic schools. See State Plan, Appendix A, at 60-61.

put the state plan in the record. This Court has held that a writ of certiorari is improvidently granted when an important issue is not presented properly on the record or not presented with sufficient clarity. *Jones* v. *State Board of Education*, 397 U.S. 34 (1970); *Massachusetts* v. *Painten*, 389 U.S. 560 (1968); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327 (1945).

The absence of the state plan from the record and the lack of any examination below of its role and function under the Act is a serious impediment to informed evaluation of Petitioners' assertions regarding the plan. The absence of the plan from the record allows Petitioners, who now complain that they lacked adequate notice that Amy Rowley had enforceable rights under § 1415 of the Act, to advance their claims about the state plan without disclosing a number of facts about it. First, New York obtained funding under the Act upon the assurance in the state plan that "New York requires a free and appropriate public education for all children with handicapping conditions" (State Plan, App. A, p. 29) and that handicapped children in New York have the same "*absolute* right to a free appropriate education" (emphasis added) as their nonhandicapped peers (Id. at 183). Second, New York obtained such funding upon the further assurance in the plan that parents who do not agree with the local district's recommendations regarding their child's program have "the right to challenge, in a hearing, *any matter* related to [the local district's] attempt to initiate or change the identification, evaluation or educational placement of [the] child, *or the provision of a free appropriate public education for* [*the*] *child, or the* [*local district's*] *refusal to make* such changes" *Id.* at 183-84 (emphasis added).

The omission of these facts clouds the record. This case is an inappropriate vehicle for this Court's first decision on this Act.

On a related issue, Petitioners presented no evidence in the courts below on "the standards of the State educational agency." 20 U.S.C. 1401(18). These courts therefore had no opportunity to decide whether the "standards" are set out in New York legislation and regulations with respect to the education of handicapped children (N.Y. Education Law, §§ 4201-4210, 4351-57, 4401-09) (McKinney's); 8 N.Y.C.R.R. § 200.1, *et seq.*) or in the New York state plan.

The opinions of the majority in the Appeals Court and the District Court make no reference to the standards of the State educational agency. Even dissenting Judge Mansfield does little more than recite the fact that New York has enacted legislation and promulgated regulations which parallel the federal act.

As a final point, amici suggest that the writ should be dismissed because Petitioners have raised an issue not considered by the courts below. Relying on *Pennhurst*, Petitioners state for the first time that ". . . the Act is clearly a funding statute. . . It does not create a substantive right to a free appropriate public education. . . ." (Pet. Br., p. 31). However, the Court of Appeals has had no opportunity to consider the Act in light of *Pennhurst* or the state plan. Matters neither pleaded, argued, nor briefed in the lower courts are not to be considered by this Court. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In light of these difficulties, this case is a singularly unsatisfactory one in which to review the issues discussed in Petitioners' brief. Accordingly, we respectfully urge this Court to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment below. If this Court finds that the writ of certiorari was improvidently granted, *amici* suggest that this Court dismiss the writ.

Respectfully submitted,

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APPENDICES

APPENDIX A

HELPING CHILDREN

with Handicapping Conditions in New York State

THE NEW YORK STATE PLAN SUBMITTED UNDER
THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142)

FINAL 1980-81

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

HELPING CHILDREN with Handicapping Conditions

FOREWORD

The State Plan for the education of children with handicapping conditions is the public statement of the goals, priorities and programs of the State Education Department.

It was written for the people of New York State who have children or are interested in our educational system.

It explains not only the requirements of the Federal Education for All Handicapped Children Act, which requires an annual state plan, but other federal and State laws and regulations that affect handicapped children.

Your comments and criticisms are appreciated.

The State laws and regulations described in this Plan should make it clear to all New York citizens that:

- New York requires a free and appropriate public education for all children with handicapping conditions who are residents of New York.

  . New York's will provide free appropriate public education by September 1, 1980, to all children between 5 and 21, because these age limits for serving children are specified by state law.

How we carry out the requirements of federal and state laws is described in the rest of this plan.

- New York accepts the priorities in the federal Education for All Handicapped Children Act to serve:

  . first, those children with handicapping conditions who are not receiving any education, and

  . second, those children, within each disability, with most severe handicaps who are receiving an inadequate education.

All of the projects listed later in this plan had to conform to these priorities before they were approved for funding by the State Education Department.

- New York will comply with the federal requirement to prepare a timetable for meeting the goal of a free and appropriate public education for all handicapped children ages birth through twenty one.

- The New York State Education Department has encouraged the State Legislature to lower the legal school age of children with handicapping conditions to three; although the legislature has not yet done so the Education Department will continue to press for expanded services for all children with handicapping conditions aged birth to twenty one. See the Plan section on EARLY CHILDHOOD EDUCATION.

- New York will, of course, serve not only those children who live at home, but also those who live in facilities operated or supervised by the Office of Mental Health, Office of Mental Retardation and Developmental Disabilities, Division for Youth, Department of Social Services or Department of Correctional Services. New York's goals apply to all public agencies in the State.

BACKGROUND

FEDERAL LAWS

INTRODUCTION

This section describes federal laws, regulations and policy statements which govern education of New York's children with handicapping conditions.

Probably the most important federal laws affecting children with handicapping conditions are the 1975 Education for All Handicapped Children Act and Section 504 of the Vocational Rehabilitation Act Amendments of 1973.

DETAILED DESCRIPTION OF EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142)

The Act:

- guarantees certain rights to children with handicapping conditions and their parents; including the right to:
  - an individualized education program written by the local education agency for each handicapped child,
  - parental review of records about their child's placement, written notice to parents of changes in placement and independent evaluation of their child if they wish,
  - a chance to appeal placement decisions,
  - non-discriminatory tests or procedures to place children,
  - wherever possible, education of handicapped children with non-handicapped children, and
  - a free education for handicapped children placed in private schools by the local educational agency because the public school can't provide the services the children need.
- gives money to the states:
  - only if a state will promise:

.. that a free appropriate public education will be available:

... by September 1, 1978 to all children between 3 and 18.

... by September 1, 1980 to all children between 3 and 21 except where such services are inconsistent with State law or practice.

.. that children who need special education will be identified, located and evaluated, and

.. that the State will serve first those children with handicapping conditions who are not receiving an education and, second, those who are receiving an inadequate education.

. local educational agencies which apply to their state to use federal money received under this law must make the same kind of promises about giving help which the State must make,

. special grants will be given to any state (to a maximum of $300 per child) which provides special education for children from 3 to 5, and

. federal funds can take the place of state and local funds only if a state can clearly prove that all children with handicapping conditions are getting a free appropriate public education.

- requires a state plan which will promise that:

. personnel serving handicapped children are properly trained,

. private school children will have a chance to participate in special education programs set up under this law,

. federal funds will be properly spent,

. programs to educate handicapped children will be evaluated at least once a year, and

. the State will have an Advisory Panel of handicapped persons, teachers, parents, state and local education officials and administrators of programs for handicapped children to give advice about services that are needed for handicapped children.

children in the program most appropriate to their needs, and evaluates the progress of such children. (For a detailed explanation, see the section on Committee on the Handicapped.)

BOARD OF COOPERATIVE EDUCATIONAL SERVICES

New York's BOCES were originally founded to offer services which could better be provided by groups of school districts. Each BOCES serves a number of school districts, and provides programs for children with handicapping conditions who cannot be served by a local school district. The local school district determines whether to contract with BOCES to provide such services.

STATE OPERATED SCHOOLS

The State School for the Deaf at Rome, is a boarding/day school for hearing impaired children whose sensory loss requires the use of special methods and a specialized language curriculum.

The State School for the Blind at Batavia, is a boarding/day school serving visually handicapped, blind and blind multi-handicapped children.

- The Office of Mental Health, Office of Mental Retardation and Developmental Disabilities, and the Division for Youth also operate schools.

STATE SUPPORTED SCHOOLS

These include:

- those schools listed in Section 4201 of the Education Law. These privately administered schools which receive state money are:

  . The New York School for the Deaf

  . St. Mary's School for the Deaf (Buffalo)

  . St. Joseph's School for the Deaf (New York)

  . Rochester School for the Deaf (Rochester)

  . New York Institute for Education of the Blind (New York)

  . Lavelle School for the Blind (New York)

  . Mill Neck Manor School for the Deaf (Nassau County)

- St. Francis de Sales School for the Deaf (Brooklyn)
- Cleary Deaf Child Center, Inc. (Suffolk county) and
- The Human Resources School (Albertson, Long Island)

"SPECIAL ACT" SCHOOL DISTRICTS

Special act schools are tuition free school districts by special act of the state legislature. Privately administered, these schools receive state funds.

Because these schools are residences for children, their residential programs are supervised by the Department of Social Services. The special act superintendent reports about the school's education program to the district superintendent of the supervisory district in which the school is located, however.

NON-PUBLIC SCHOOLS

These include:

- schools run by private groups, many of which are affiliated with religious organizations. Some of these schools have their own programs for children with handicapping conditions; others send their children to public schools for such services.
- private schools specifically for children with handicapping conditions. There are over two hundred such private schools whose programs have been certified as acceptable to the State Education Department. Parents can send handicapped children to private schools at local school district expense if the district can't provide a suitable program for the child.

STATE EDUCATION DEPARTMENT. OFFICE FOR EDUCATION OF CHILDREN WITH HANDICAPPING CONDITIONS.

Although other offices of the State Education Dept. provide services to the handicapped, the unit directly responsible for carrying out the mandates of the federal Education for All Handicapped Children Act is the Office for Education of Children with Handicapping Conditions. A chart showing how that office is organized is on the next page.

As the chart shows, the Office includes:

CHALLENGING DECISIONS OF THE COMMITTEE ON THE HANDICAPPED

From Your Child's Right to an Education:
All school-age children have an absolute right to a free, appropriate education. Your handicapped child is entitled to the same rights and privileges as nonhandicapped children. As a parent of a handicapped child, you also have rights that protect you and your child. Your school district must take certain steps to protect these rights to make sure that your child's needs are accurately evaluated and that he/she gets the educational services needed. The procedural steps that your district must take to protect your handicapped child's educational rights are called "due process" safeguards.

Your district must give you an opportunity to question or challenge recommendations and decisions about your child's educational program. Whenever possible, attempt to settle these disagreements between you and the school officials informally by meeting with the Committee on the Handicapped. Open lines of communication between parents and school officials often solve problems before they start.

In an earlier section of this plan, the role of the Committee on the Handicapped was discussed, so you already know that the Committee must secure your written permission to conduct an evaluation of your child to determine his/her need for special education services. You may request an informal conference to discuss the need for the testing and, if necessary, request a hearing to challenge the need for the evaluation.

You also know that you are entitled to an informal letter or a phone call advising you of your opportunity to speak to the members of the Committee on the Handicapped regarding the classification and placement of your child before the Committee has made any recommendations to the Board. Your district must send you a formal letter called a notice which explains the actual recommendations of the Committee and the reasons upon which the recommendation is based.

If you do not agree with the recommendation of the Committee, you have the right to request a hearing, which is a formal, legal procedure. To do this, send a letter to your Board of Education. Keep a copy of your letter. Federal regulations give you the right to challenge, in a hearing, any matter related to a Committee's attempt to initiate or change the identification, evaluation or educational placement of your child, or the

provisions of a free appropriate public education for your child, or the Committee's refusal to make any changes.

Once the Board has received your request, it must arrange for a hearing. It is up to the school district to make certain that the following procedures are followed:

The hearing must be conducted by an Impartial Hearing Officer. The Hearing Officer cannot be employed by, or be an officer or agent of, your local school district or BOCES. He/she must be unbiased and give you and other spokesmen of your child an opportunity to present your side of the dispute. Your school district must keep a list of hearing officers and their qualifications.

A written or tape-recorded verbatim (word-for-word) record of the hearing must be made and be available to you and everyone who participated in the hearing.

If they are needed, interpreters of the deaf and/or interpreters of the language spoken in your home must be available. The district must pay for this service.

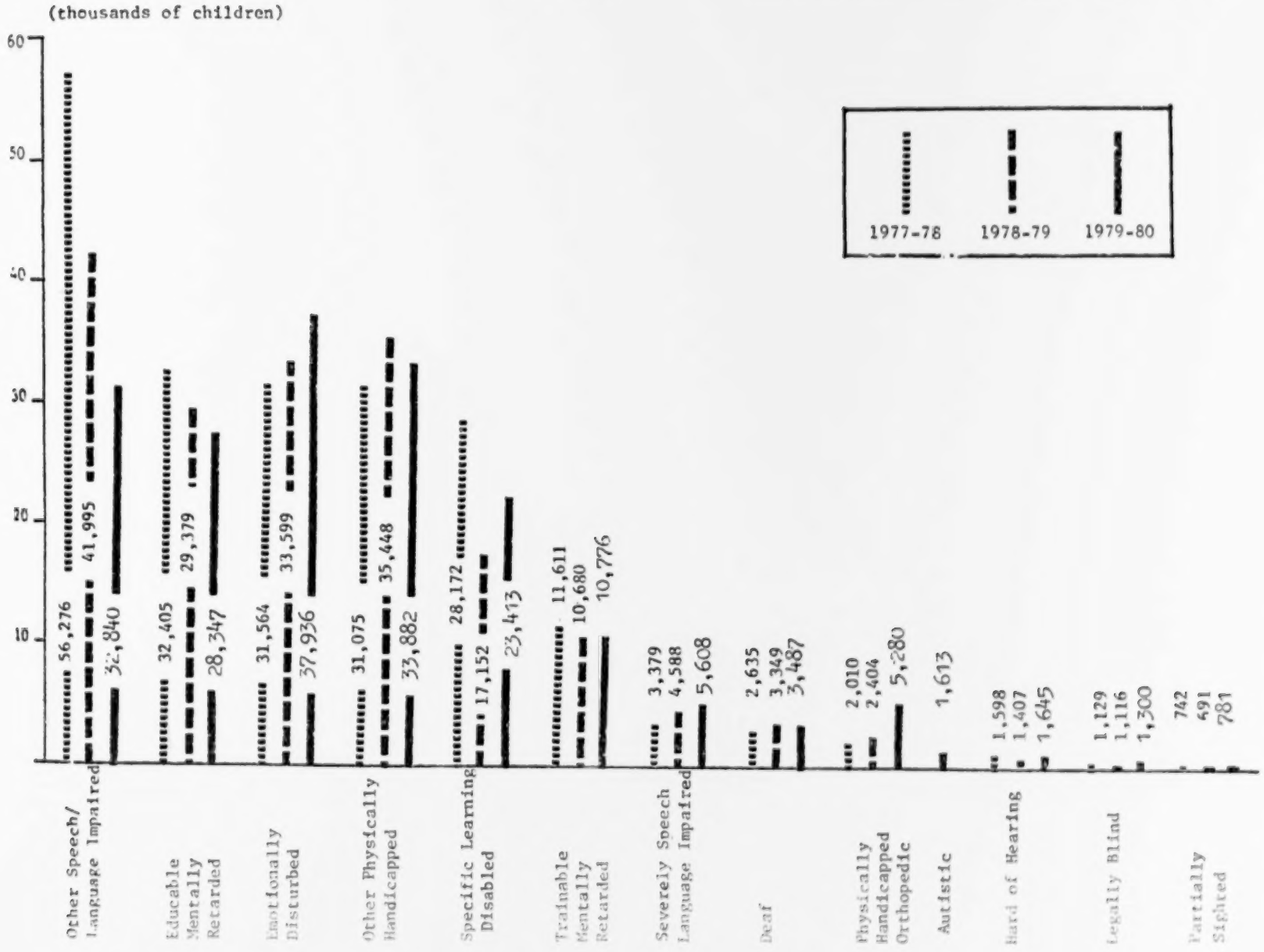
You may be represented by an attorney and/or accompanied by professionals and any other persons of your choice to the hearing.

You and/or your attorney will have an opportunity to question the school authorities and all witnesses; they will also have an opportunity to question you. All evidence that is introduced at the hearing must have been shared with the other party to the dispute at least five days before the hearing. All parties at the hearing must be given an opportunity by the Impartial Hearing Officer to present evidence and testimony.

If your child is over the age of 18, he/she may attend the hearing; if your child is not yet 18, you can decide whether or not he/she should attend. Federal regulations require the hearing to be at a reasonably convenient time and place for parents.

After both sides have presented their cases, the hearing officer must make a decision. Federal regulations require a hearing officer to:

STATEWIDE TOTAL OF EACH HANDICAPPING CONDITION



APPENDIX B

No. 10447

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE DEPARTMENT OF EDUCATION
Before the Commissioner

IN THE MATTER
of the

[SEAL]

Appeal from the BOARD OF EDUCATION OF THE SACHEM CENTRAL SCHOOL DISTRICT at Holbrook from a decision of an impartial hearing officer, relating to the provision of special educational services.

C. Francis Giaccone, P.C. ....attorney for petitioner
John H. Mulvehill, Esq. .....attorney for respondents

This is an appeal by the board of education from a decison of an impartial hearing officer concerning the provision of special educational services to two children resident within the district. The board requests that I reverse the order of the impartial hearing officer and order that the children attend the Mill Neck School, a private school for the deaf. The appeal must be sustained in part.

In his decision, the hearing officer found that petitioner's recommended placement at the Mill Neck school for the deaf was not reasonable and directed petitioner to pursue placement for the children in programs conducted by local school districts. The hearing officer also directed petitioner to consider establishing appropriate

programs in the district for other children with needs comparable to those of the children whose placements are the subject of this appeal. In the interim, he directed the district to offer the childrens' parents the option of continuing their children at Cleary, their current school, or placing them in the Mill Neck school.

The first child is classified as deaf. He has attended the Cleary School for the Deaf, and is presently enrolled in a secondary program provided by that institution at Mercy High School. During the 1979-80 school year, the child was mainstreamed in several subjects, including ninth grade consumer math, fine arts and gym. He was also mainstreamed in a history program for one semester, but was removed from that program due to poor academic performance. All of his other instruction occurred in a resource room. This child has also participated in the Mercy high school track team as an extracurricular activity.

Formal testing thus far administered reveals that this child is functioning within the average range of intelligence, with a reading level at approximately fourth grade and a math level of approximately fifth grade. It must be noted that those test results, with one exception, are based upon hearing population norms. Thus, while these tests establish the child's relationship to hearing children in a mainstream placement, no accurate comparison between this child and other deaf children can be made. The test results were also influenced by improper administration in that several subtests had to be discontinued due to a lack of communication between the examiner and the interpreter. According to his IEP, this child is actually functioning at the ninth grade level in math, but his level in reading is not indicated in the IEP. None of his teachers from the Cleary school were present at the hearing to provide the missing information.

The child's classification as deaf is not challenged in this proceeding. However, there has been no audiological evaluation done to determine what benefit, if any, individual amplification devices, FM transmitters and other comparable devices might be to this child. In addition, although the record indicates that the child may have vision problems, there is no ophtalmological report in the record. In order to permit a proper assessment of this child's needs, certain additional information is necessary, including a complete educational assessment, a testing process which compares this student with other deaf children, and direct information from the classroom teachers who are currently instructing him.

The second child involved in this appeal began attending the Cleary school elementary program at the age of 4½ and entered the secondary program at the ninth grade level in September of 1979. During the 1979-80 school year, this child was mainstreamed in fine arts and gymnasium courses. All academic instruction was provided in a resource room.

The standardized tests administered during the 1979-80 school year indicate that this child is functioning within the average range of intelligence. He is reading at the fourth grade level and his mathematics performance is at the sixth grade level. As in the other case, these test results and scores are based on norms established for a hearing population. Thus, while they allow comparison of this child's abilities with hearing children, there is no way to determine how he would compare with other deaf children. He is functioning at the fifth grade level in mathematics, but the IEP does not indicate the instructional level for reading or any other academic area. Again, as in the other situation, no teachers from the Cleary school were present at the hearing to provide that information.

According to the coordinator from the Cleary school secondary program, this child has a learning problem and

requires multiple review of new material before being able to remember or use it. This seems to have been a factor in the determination that he would not benefit from placement in mainstreamed classes at Cleary. There was, however, no evidence in the record to indicate that any special education instructional services were provided for this problem.

The record thus presented does not provide a basis for determining the components which would constitute an appropriate program for this child. While, there is information in the record relating to this child's communication skills which indicate that the district's "Oral Program for Deaf Students" might be appropriate, without a comprehensive evaluation of the child's educational needs, a conclusive determination is not possible. Evaluations to be conducted should include a complete medical examination, an audiological evaluation to determine what benefit, if any, utilization of individual amplification devices might provide for this child, a social history to assess his current preparation and his potential for instruction with hearing peers, and the complete educational assessment referred to previously.

The information contained in the record does not support the placement recommendation made by petitioner. Moreover, two observations must be made as to any future recommendations for this student. A district does not discharge its obligation to provide an appropriate placement for a handicapped child by limiting its consideration to currently known placement options. There is no indication in this record that the district sought information with respect to other placement options which might be available in other local districts. Secondly, since this child is sixteen years of age and will soon be looking for employment in a world in which the vast majority of individuals are capable of hearing, the district should make every effort to determine the least restrictive environment for this child's education.

Based upon my review of the record, I find insufficient basis to sustain the recommendation made by petitioner to place both of these students in the Mill Neck School. In both cases, insufficient information about the youngster's needs was provided, and it was not evident that the district had evaluated sufficient program and placement alternatives in order to make a fully informed determination.

One other observation is worthwhile at this point. Although the hearing officer's decision does not directly address the issue, implicit in that decision is the finding that the decision and order of the United States District Court for the Southern District of New York in *Matter of Rowley* v. *Ambach*, 483 F. Supp. 528, aff'd —— Fed 2d ——, decision dated July 17, 1980 is one of general application to all deaf children. While the record does not indicate that the hearing officer had the benefit of having read the decision of the Circuit Court of Appeals in making his determination as to the placement of each of the children in this appeal, it is clear from the opinion affirming the District Court decision that the Circuit Court did not consider the lower court decision to be one of general application to all children who have hearing disabilities. Each case concerning the placement of deaf children must of necessity depend upon the needs and abilities of the individual child for whom placement is sought.

It is evident, therefore, that this matter must be remanded to petitioner in order that a comprehensive and individual assessment be conducted as to each child's educational needs to determine an appropriate placement. Any such assessment should, of course, include medical, educational, psychological and social evaluations.

While this further evaluation is being conducted, the children should remain in their current placements at the Cleary School for the Deaf (see *Matter of M. and K.* v. *Board of Education of the Sachem Central School Dis-*

trict at Holbrook, Supreme court, Suffolk County, Justice Stark, decision dated September 19, 1980 (n.o.r.)).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED,

IT IS ORDERED that within thirty days of the receipt of this decision petitioner conduct further assessment of each child in accordance with this decision, and develop a comprehensive individualized education plan for them, and

IT IS FURTHER ORDERED that following the development of such a plan, petitioner review all program and placement alternatives that may be appropriate for each child and recommend placements for them.

THE APPEAL IS IN ALL OTHER RESPECTS DENIED.

IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 13th day of January, 1981.

/s/ Gordon M. Ambach
Commissioner of Education

[SEAL]